IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNIFIED WESTERN GROCERS, INC.,) CIVIL NO. 03-00336HG
)
Plaintiff,)
)
vs.)
)
TWIN CITY FIRE INSURANCE COMPANY,)
)
Defendant.)
)

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Friday, March 11, 2005, at 11:37 a.m., at Honolulu, Hawaii,

BEFORE: THE HONORABLE HELEN GILLMOR
United States District Judge

REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court Reporter

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FRIDAY, MARCH 11, 2005 11:37 A.M.

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THE CLERK: Civil Number 03-336, Unified Western Grocers, Incorporated, versus Twin City Fire Insurance Company.

This case is called for hearing on plaintiffs' motion for reconsideration of the court's December 6, 2004, oral order granting defendant Twin City Fire Insurance Company's motion for summary judgment; and defendant's motion to quash subpoena.

MR. McCORRISTON: Good morning, Your Honor.

William McCorriston, John Steiner and Chris Cole for the plaintiffs, both corporate and individual.

THE COURT: Good morning.

MS. BALL: Good morning, Your Honor.

Samantha Ball, Wesley Ching, and Kim West is available by telephone, for Twin City Fire Insurance Company.

THE COURT: Good morning.

MS. BALL: Good morning.

THE COURT: Okay, Mr. McCorriston, you have filed a motion for -- the rest of you folks, why don't you sit down.

Mr. McCorriston, you filed a motion for reconsideration, so if you want to argue that.

MR. McCORRISTON: Thank you very much, Your Honor.

Your Honor is correct, this is our motion for

reconsideration, and let me begin by saying what it is not asking to be reconsidered:

We are not asking that the denial of our affirmative motion for summary judgment be reconsidered; we are not asking that your ruling on exclusion F be reconsidered. We are only asking that your grant of the defendant's motion for summary judgment be reconsidered under the grounds of manifest error, and new evidence.

Now, whether the rubric is under Rule 59(e) or

Rule 60 is really pretty much the same bag, and we do not believe that the court erred in characterizing the complaint in the light most favorable to the defendants to deny our motion for summary judgment. We do believe that characterizing the complaint in a light most favorable to the defendants, to grant their motion for summary judgment, is manifest error.

Judge, I'm not going to deal with the procedural issues because I think they are pretty well discussed in the papers. There's ample authority for you, under either 59(e) or 60, to grant -- entertain the motion for reconsideration.

I want to turn to, really, the basis of our concern about the ruling, which is that, when you stated in your oral ruling that this case was primarily one where allegations were of looting, you recognized, to use your word, that there is a disconnect in some of the paragraphs to the looting

allegations, recognizing, I think implicitly, that there are certainly other theories in the third amended complaint in addition to the looting allegations.

But then you went on to state that this being primarily a case involving looting allegations, that you believe, under the policy, it would not apply at all to the third amended complaint, and thereby granted summary judgment.

I think in doing so there were two critical paths that the court should have taken to avoid error. The first was to examine all the paragraphs in the third amended complaint; more specifically, those that we have described in our papers.

And this morning I would like to address

particularly those paragraphs that begin on 140 of the third amended complaint, et seq.

Paragraph 141 attaches, as Exhibit 1, a listing of all the actions taken by the defendant officers and directors, and that's the focus of my argument this morning, Your Honor. The focus is on officers and directors, and the breach of fiduciary duties that are alleged in the third amended complaint against them.

And in paragraph 141, it does state -- not by implication, but expressly, that what is being complained about is the action of these officers and directors on May 13th, 1996, where the amount of damages were $13.5

million.

Paragraph 142: That these same officers and directors who took those actions in Exhibit 1, as stated in paragraph 141, that they all had conflicts of interest because they were officers and directors of other subsidiaries or affiliates of Unified.

And, importantly, paragraph 143, Your Honor, where it's alleged that these same directors and officers, in taking those same acts, knew or should have known -- underscored: Knew or should have known, that they had a conflict of interest. That's classic breach of fiduciary duty language. That's classic negligence language. That's classic tort law pleading.

Paragraph 143, in and of itself, establishes, by notice pleading, a negligence claim in this case.

Paragraph 144 continues on the same path: That the defendants, in taking these actions, again, in classic

negligence breach of fiduciary language, knew or should have known that they would breach their -- parentheses (fiduciary) close parentheses -- duties as officers and directors, and that subsequent to May 13th, 1996 -- that's the date of the sale, Your Honor -- so they are saying both at the date of the sale, and thereafter, the same individual defendants breached their fiduciary duties under the negligence standard by taking further actions that aided and abetted HGS to do things which

ultimately inured to the detriment of their creditors.

Paragraphs 146 is also instructive, because that paragraph says that what we are saying in these series of allegations is not limited to disgorgement or restitutionary damages; it's saying that those damages are included -- but the damages are not limited to the amount paid to our clients for the sale of HGS, and the interest on the $5.3 million promissory note.

As you probably are aware, that the total amount of disgorgement -- potential amount of disgorgement or restitutionary damages is a tick under $3 million, which would include the $2.5 million consideration paid, and approximately $350,000 worth of interest paid on the note, that is mentioned in paragraph 146.

So, here we have a very clear allocution of negligence; a very clear allocution of breach of fiduciary duties; a statement of damages far north of the $3 million disgorgement or restitutionary damages, so there, I think, is the "disconnect" that Your Honor mentioned in her oral ruling; that, if the restitutionary damages, or disgorgement damages, are $3 million, where do the rest of the $13.5 million come

from?

Well, the rest of the $13.5 million, and including the first $3 million, comes from the breach of fiduciary duty claims that are alleged against these individual officers,

that they knew or should have known -- that had conflicts of interest or had done acts in Exhibit 1 to the complaint which violated negligence pleading -- negligence standards.

So it's clear, there's been no explanation in any of the papers from the defendants as to where this $13.5 million damages can come from in a restitutionary context, or disgorgement context.

Your Honor, the complaint, for an example, includes -- in that many iterations of it, including the third amended complaint -- claims such as that from the State of Hawaii, where it is alleged that, from 1997 through bankruptcy -- November, 1997, now, this is almost a year and a half after the sale took place, not money that we got from the sale, not money that we got from HGS -- that, somehow, because of the breach of fiduciary duties and negligence of the defendants, that damages which started accruing a year and a half after the sale, by nonpayment of tobacco taxes, are our fault, are our damages.

Those aren't disgorgement damages. Those aren't restitution damages. HGS never got the money -- I mean Certified, the defendants, never got the money. Obviously, these are damages that exist independent to any kind of looting allegation that are in the complaint. There has been no explanation of how the looting allegations relate to these other itemization of damages.

We have included two expert reports. As this court knows, under our local rules, there are certain deadlines set for the disclosure of expert opinions. Included in those local rules -- subsumed within them, are certain due dates as to when a party must disclose what their theory of damages is, what the support for the damages -- what data supports the damages, and any expert opinions which are going to be offered to support the damages.

Now, as it's been pointed out, we did get these reports on November 23rd -- the afternoon of November 23rd, and our reply briefs were due on the 24th. It is true that we did not submit them as part of our reply brief; in fact, they weren't reviewed before we submitted the reply brief because we were undertaking the responsibilities that we had with regard to the pleading, and not through the discovery at that time.

But to analogize this, as the defendants have, to having Shaquille O'Neal on the bench, and not playing him in the game, and then only after we lose the game coming back on a motion for reconsideration and asking to play Shaquille O'Neal, is absolutely incorrect.

We went into the motion believing, as I have just stated, that the paragraphs that I have enumerated, the negligence theories, the breach of fiduciary duties, we thought was enough to grant us our summary judgment, but at

the least, deny the motion for summary judgment that they had.

If anything, in those paragraphs which I have just

enumerated, that shows that Shaquille O'Neal was playing the game all the time; that was brought to the court's attention.

But the expert reports are kind of like videotape that Shaquille O'Neal actually was in the game, because those expert reports show, just as I have stated today, that the primary focus of this case, at least as of the time the experts' reports were filed, are not looting allegations; they are allegations that these directors breached their fiduciary duties, and as a consequence, that even though the company, HGS, may not have been insolvent, they were, quote, "within the zone of insolvency," and according to these experts, and the theory that at least is being proposed as the theory for damages in the case by the expert witnesses, that at that point in time, because the directors knew or should have been -- again, a negligence -- breach of fiduciary standard -- that they were within the zone of insolvency, they should have known that the company was going to go further and further into debt. And as they went further and further into debt, the chances of repaying creditors -- which appeared after the sale -- would have been difficult.

And that's in the law -- which, by the way, has not been adopted by the State of Hawaii, or this court, but it has been adopted in other jurisdictions, this theory of zone of

insolvency, and deepening insolvency, that the experts rely on.

Basically, their theory is, we should have liquidated the company on the date of the sale, rather than sell it; by failing to liquidate the company, we breached our fiduciary duties, thereby causing the company to become

increasingly insolvent.

That is not looting; that is a negligence standard; that is a breach of fiduciary standard. Those expert opinions, and those expert opinion reports, absolutely stand for the proposition that, if that theory is viewed in the light most favorable to the defendants, motion for summary judgment should never have been granted to the defendants in this case.

Your Honor, there really is -- maybe we'll hear something today, but there's been nothing in their papers to explain -- by the way, those expert reports have now moved the figure from $13.5 million, which I read to you in the allegations in the complaint, to something -- damages in excess of $20 million, which they want from the individual defendants, jointly and severally.

Under this theory, it has nothing to do with looting; their current theory is that we should have determined, and did not, through negligence, or breach of fiduciary duties, that this company was in the zone of

insolvency, and declared the company insolvent, liquidated it and not sell it. That's their theory. That's falling -- fairly within the four square corners of the insurance policy.

Your Honor, I take umbrage to the language in the papers of the defendants, that somehow, because there has been a settlement agreement -- and let me update to you that the settlement not only was put on the record, but now it has been finally documented. It still has to be approved by the bankruptcy court. That's the status of the settlement, that somehow there was some collusion in this case between

Mr. Jaress and myself, regarding the motion for reconsideration.

As I stated in my declaration, I did not talk to Mr. Jaress about my proposed offer of proof in this case; that proffer comes from what I have learned in the depositions, in the transcripts of the depositions, which, by the way, have been sent to the defendant's counsel. I have not talked to Mr. Jaress about what his testimony would be, and nothing in the settlement presupposes that the insurance company pays a dollar. A settlement in this case is independent of what happens here, and what happens as far as insurance coverage.

So to state, as to me, and as to Mr. Jaress, that there is somehow some unfair collusion, so that we could bring this motion for reconsideration, is both unjust, unfair, and I hope will be retracted by counsel in the course of this

hearing.

Thank you, Your Honor.

THE COURT: Thank you, Mr. McCorriston.

Now, Mr. West, you are still with us?

MR. WEST: Yes, I am.

THE COURT: Okay.

Who is going to be arguing today?

MS. BALL: I will, Your Honor.

THE COURT: Okay.

MR. WEST: Your Honor?

THE COURT: Yes, Mr. West?

MR. WEST: Samantha Ball is obviously going to argue, but if I could address a few points?

THE COURT: Before or after Ms. Ball?

MR. WEST: Before.

MR. McCORRISTON: Your Honor, I think only one should be allowed to argue, following local practice.

THE COURT: Well, if he has some comments that may be of assistance, I would like to hear 'em.

Okay, Mr. West, speak up.

MR. WEST: I'll make it quite brief.

Your Honor, it's not the legal theories or the causes of action that determine whether there's coverage; it's the conduct and the wrongful acts that are alleged that determine whether something's uninsurable or not.

So the court correctly concluded that this asset stripping scheme was really something that resulted in the looting of the corporation. And the fact that the theories of liability might include negligence or breach of fiduciary duty is not the determining factor.

The determining factor for determining whether something constitutes a return of an ill-gotten gain, or whether it's an uninsurable loss because of the nature of the conduct, is determined by the very acts themselves.

On the issue of the zone of insolvency, and the theory that they should have liquidated instead of selling, and that that is not looting... well, it's obvious that -- the flip side of that is, they chose not to liquidate because they chose, instead, to initiate the looting scheme.

So they are really putting the cart before the horse in arguing that that's not looting. The failure to liquidate when they should have liquidated results from the decision to strip assets out of the company. And, once again, those are

uninsurable wrongful acts.

And, then, finally, Your Honor, you very carefully considered, at the initial hearing, the very allegations of the complaint, and there are ample allegations in the complaint, as you recognized, that show that not only were they pursuing an ill-gotten gain in seeking disgorgement of an ill-gotten gain, but also, that the directors and officers

personally benefited.

So those are the points that I wanted to make.

One quick point about the references to collusion in the settlement:

The reality is, is that the settlements that are proposed are unusual on their face because, given the nature of the allegations, the amount that they are seeking to settle from the directors and officers is significantly more than the settlement amount from the corporation. That speaks volumes.

So those are my comments, Your Honor.

THE COURT: Thank you, Mr. West.

MR. McCORRISTON: May I address those comments, since we are taking different counsel?

THE COURT: No. I am going to let her speak first, and then you will have your rebuttal.

MS. BALL: Thank you, Your Honor.

THE COURT: Because we will be here all day, and I've got other...

Okay, go ahead.

MS. BALL: Thank you, Your Honor.

As we argue in our papers, Your Honor correctly decided the summary judgment motion based upon the allegations

in the third amended complaint. As Mr. West just pointed out, the insuring agreement of the policy, and the law provides that you did exactly what you should have done: You looked to

see what was alleged.

Your Honor, this is a simple insurance matter. The third amended complaint speaks to a looting scheme, a scheme to rob all of the assets of HGS until it was no longer able to operate. This is simply not insurable under California law.

Now that plaintiffs have lost, they come here and they seek a second bite of the apple. I just heard Mr. McCorriston make exactly the same argument that was made by McCorriston's firm, Mr. Seibert, at the hearing on December 6, on the motion for summary judgment. They vigorously argued the breach of fiduciary duty cause of action, and they vigorously asserted that there was insurance coverage for those claims.

Conversely, Your Honor, Twin City pointed the court's attention to the Bank of the West, and the Level Three cases, which stand for the proposition that you have to look past the labels; you have to look to see what's really happening. It doesn't matter if you use a nicer word than "theft," it's still uninsurable if it has to do with the restoration of ill-gotten gains.

Your Honor, they spoke regarding an amount of money, and as Your Honor is aware, the pleadings set forth the amounts of restitution, and they are much higher than Mr. McCorriston just stated. And, again, you have to look to the allegations in the third amended complaint, not to what's

proven, because there's not been an adjudication, and due to the settlement I doubt there ever will be.

Those amounts are expressly set forth in the paragraphs in the third amended complaint, and they total $7.7 million. Regardless, the complaint is full of allegations that state that this conduct is uninsurable.

Because Mr. McCorriston just went through his favorite portions of the complaint, I'll briefly remind Your Honor that the third amended complaint, at paragraph 28, said that the defendants schemed or embarked on a series of transactions to take as much money as they could.

The third amended complaint then says that the defendants falsely endorsed documents, and falsely completed articles of incorporation. That's in paragraphs 34 and 35.

Continuing, paragraph 35 says that they falsely altered and erased or obliterated information on documents. Paragraph 40 mentions the word "intentionally."

Moving on, Your Honor, paragraph 79 speaks to cash being taken from HGS by the defendants. And it also speaks to the conduct of the defendants as aiding and abetting and conspiring with one another to rob assets from HGS.

Paragraph 82 mentions the scheme that the defendants embarked upon, to withdraw cash from HGS and give it, essentially, worthless stock.

Continuing on to paragraph 106, the trustee alleges

that the scheme rendered HGS insolvent. Paragraph 107 says the scheme intended to mislead others.

I'm almost done...

At paragraph 118, the trustee alleges that the defendants engaged in an effort to conceal their wrongful acts. Evidence of the same was fraudulently concealed by defendants. And then it continues on to say that these acts were concealed from other officers of HGS, and that said concealment was done intentionally.

Count 17 of the third amended complaint, at paragraph 239, says that defendants aided and abetted one another. Paragraph 260 says that the defendants have been unjustly enriched, and the court should order restitution. Paragraph B, in the prayer of relief, asks for rescission of the transactions.

Your Honor, this conduct cannot be insurable under California law. I believe Your Honor carefully looked at all the evidence before this court at the hearing on December 6 of 2004, and correctly ruled that there's no coverage under California law for such conduct, regardless of the fact that the trustee uses the word "damages," and regardless of the fact that he has a cause of action for a "breach of fiduciary duty."

The cases instruct us that you have to look past the label, to see what the wrongful acts actually are, and if they

have to do with wrongful taking, theft, robbery, looting -- whichever word we choose to affix to it, it's uninsurable.

Moreover, I believe that Mr. McCorriston has bypassed the standards on reconsideration, because they are so rigorous. Your Honor, they are not allowed to come in here and make the same argument again. They should be precluded

from going through the same argument, and we should not have to respond to it.

Moving on to the expert report issue, Your Honor, those expert reports were available prior to the date that the McCorriston firm filed their reply brief, and they were available prior to the date that they gave oral argument. They had 13 days to think about and mention the expert reports, yet they chose not to do so.

At the hearing on December 6, Your Honor let us speak for almost an entire hour, and at the conclusion of oral argument, you asked if we had anything else to say. No one spoke. The McCorriston firm did not speak.

Moreover, those expert reports don't meet the standard of newly discovered evidence not previously available. If you look at the expert reports, if Your Honor is even going to engage in that activity, you'll see that the experts rely on information that was available as early as 1989, and the latest information contained in the reports appears to be several years ago.

They could have obtained that information before, had they wanted to. It's not new, and it's not evidence, Your Honor; it's expert opinion. It's the opinion of the experts based upon some math calculations that they did. These are CPA's; they are not qualified to speak to whether or not those numbers are the equivalent of the restoration of ill-gotten gain; that's not their bailiwick. That's why they don't speak to those issues in their reports.

They crunch numbers, and they come up with a series of numbers, but, again, Your Honor, it doesn't matter; under

Bank of the West, and Level Three, you have to look past the labels.

If you count as many times that they use the word "damages," it makes no difference. If it has to do with the restoration of something that was taken, it's not insurable.

Your Honor very correctly took a look at the third amended complaint, and all the evidence that was before this court, and you determined that there's no coverage, as a matter of law. For plaintiffs to come in here now, after they had their day in court, and their opportunity to present their best evidence, and to insinuate or accuse this court of coming to a conclusion that no other court could have come to, a wholesale disregard or misapplication of the law, is absurd, and it's quite unfair, Your Honor.

I believe Mr. West has addressed the other issues

that Mr. McCorriston brought up, and I don't know if this is the proper time for me now to speak to the issue regarding the motion to quash, Your Honor? But if you would like to defer, then I'll submit at this time.

THE COURT: No, go ahead, you can speak to that.

MS. BALL: Okay.

Your Honor, Mr. Jaress, as you know, is the counsel for the trustee, and plaintiffs attempt to have him come in here --

THE COURT: I think it's pronounced "Jaress."

MS. BALL: "Jaress," thank you, Your Honor.

...to have him come in here and testify about what he did not express in the third amended complaint.

What they suggest is that an insurance company would

have to contact the attorney who drafted the complaint to find out if he really intended something other than what he wrote when he drafted the complaint. That idea is absurd.

Secondly, if you follow their line of thinking, once judgment had been entered, or once summary judgment had been ruled on, the insurance company, and perhaps even the court, would have to contact the drafter of the complaint to make sure that he hadn't changed his mind to find out about what he thought, but didn't write in the third amended complaint.

Mr. Jaress had four opportunities to draft that complaint, and I'm well aware that there was much dispute

regarding the allegations.

And, finally, the third amended complaint was answered by the Unified defendants. Not once did they mention in their oral argument, or in their papers on summary judgment, that what Mr. Jaress might think -- but didn't express -- is relevant.

Moreover, anything that Mr. Jaress might have to say, that's duplicative of what's in the third amended complaint, is cumulative and it's a waste of this court's time to listen to it.

The policy provides, and the law holds, that Your Honor should look at the third amended complaint, at the allegations, to determine whether or not there's coverage. Your Honor did that.

The law does not suggest, or provide in any instance, that the drafter of the complaint has anything relevant to say -- outside of what he already put down on the piece of paper. There's not one case -- we could not find one

case, after days of searches, where a court in the United States of America allowed that. And that's because, Your Honor, it's simply an absurd idea.

We would ask that you would quash the subpoena to Mr. Jaress.

And while we never intended to insult Mr. McCorriston in any way, we feel that his declaration is

not based upon personal knowledge due to his purported lack of conversation with Mr. Jaress; and, moreover, because Mr. Jaress' testimony is irrelevant, Mr. McCorriston's declaration should not be considered, nor should it be part of this record.

And if you have any questions, Your Honor, I would like to answer them; otherwise, I'll submit at this time.

THE COURT: Thank you; I have no questions.

MS. BALL: Thank you, Your Honor.

THE COURT: Do you wish to speak again, Mr. McCorriston?

MR. McCORRISTON: Yes, thank you, Your Honor.

I think Mr. West and Ms. Ball make my point for me, that not once did they dispute the fact that paragraphs 141, et seq., state a claim for negligence, and breach of fiduciary duties because, obviously, they do, on their face, but they were overlooked in the court's opinion.

They seem to pay lip service to the correct legal proposition that the court has to look beyond the plain words in the pleading. And then they ask you to do just that, only read the pleading, and, beyond that, only read it the way they read it. So they want you to do two things: They don't want

you to go beyond the face of the pleading; and even as to the face of the pleading, they want you to only read the paragraphs that they want you to read, not the paragraphs that

I want you to read, and they want you to characterize it the way they want it characterized, not the way I want it characterized, and that's just not the law.

Your Honor, there is a negligence claim stated. There is a breach of fiduciary duty stated. There is no contest, and none has been made, either this this morning, or in their papers, that that type of negligent breach of fiduciary conduct is covered within the four corners of the policy.

So they want you to say that this is really a case about looting. Nothing's been proven in this matter -- in the underlying case, about looting.

Mr. Jaress -- and we believe he's correct -- totally incorrect about whether or not there was any looting. There are allegations of intentional conduct such as looting, and there are also allegations for negligent breach of fiduciary duty conduct. One is not covered on the policy; one is covered under the policy.

They only want to look at one side of it. I want you to look at the other side of it. But what is wrong is if you give an omnibus characterization to the whole complaint which is inconsistent with some of the allegations -- which is what has happened.

I think Ms. Ball makes the point again when she says -- and reads to you from the complaint, paragraph ten,

paragraph 38, paragraph 34, paragraphs 35, 40, 79, 118, 239, and others, which say that these have to do with the fact that these people looted the company, and the damages is -- we want that money back.

Where is the other $10 million in the complaint? Where have they ever explained that to you? Where's the $10 million -- where's their evidence, or even a theoretical model, that that $10 million was put into my client's pocket, either the individuals, for personal benefit of them, or the corporations? That $10 million isn't money that was put into anybody's pocket; it was third-party --

THE COURT: Mr. McCorriston, if I followed your line of logic, there would be no damages that grew out of looting that could be collected, and that just can't work. I mean, you can't insure the damages that grow out of looting, either, just like you can't insure the looting. So that kind of progression, logically, isn't working for me.

MR. McCORRISTON: Judge, I don't know --

THE COURT: And I know, by saying that, I raise lots of issues in your mind, but I've got to do a video conference with people on the mainland at 12:00, so we have to wind this up.

MR. McCORRISTON: Judge, the motion for summary judgment really was for one step of a two-step process. The first step is whether there are any covered claims --

potential covered claims in this case, and those are the ones I've told you: The negligence, the breach of fiduciary duties, upwards of $20 million in claim are nonrestitutionary,

they're non-intentional; they are obviously covered claims.

So step two would be the application between uncovered claims and covered claims, if there was a finding of looting -- which there may be, and there may never be.

So you cannot characterize and assume that the allegations regarding looting are correct, and in fact make a finding of looting, when there are parallel allegations of negligence which may have led to the underlying plaintiffs incurring the same type of damages.

In other words, every single penny, including the $3 million, could have resulted from the negligence of breach of fiduciary duty conduct which is covered by the individual defendants. Every single penny of it. It doesn't depend on whether or not there was looting or not.

So they have -- and it's not uncommon to have -- different theories of liability for the same types of damages. But when there are different theories of liability for the same types of damages for coverage questions -- and this was the Gray versus Zurich -- you can't pick one and say the whole case is about one; you can't assume that. If there is any theoretical model which is within the covered claims, that's what you go with.

And I'll just end on this, Your Honor. I am quoting from Gray versus Zurich; everybody believes the California laws -- Gray versus Zurich is the seminal law in California on this subject:

"To restrict the defense obligation of the insured to the precise language of the pleading would not only ignore the thrust of the cases but would create an anomaly for the

insured."

As the Richie versus Anchor case points out, "the complainant in the third-party action drafts the complaint in the broadest terms, he may very well stretch the action which lies in only nonintentional conduct to the dramatic complaint that alleges intentional conduct."

Exactly what we have here: We have both. And I admit the dramatic part of the complaint is the intentional conduct.

In light of the likely overstatement of the complaint, and of the plasticity of modern pleading, we should hardly designate the third party as the arbiter of parties' coverage.

In other words we should look beyond the characterization in the complaint. Are there theoretical models involved in this damage claim which could come within the coverage of the insurance policy? Obviously there are in negligence breach of fiduciary duty claims.

Thank you.

THE COURT: Thank you, Mr. McCorriston.

Now, I recognize that there is a lot of money at stake in this case, and that the kinds of allegations in all four of the complaints are the kinds of allegations that make people very uncomfortable, because they are talking about true wrongdoing, not just mistakes being made. The allegation and the essence of the complaint is about people actually doing something very wrong, and that also makes people very uncomfortable.

But this case is one that I have spent a great deal

of time on before it went over to Judge Real, and I wrote -- I don't know if it was two or four orders in this case, and I spent a great deal of time dealing with the complaints, and seeing what it was they were alleging, and so I am comfortable with my previous ruling.

I feel that this case is one that alleges wrongdoing, and I'm not going to repeat now -- I will issue a written order, I'm not going to repeat now what I said earlier, but I am not persuaded by the motion for reconsideration, and I don't believe that it would be appropriate to hear from Mr. Jaress on this. I don't think that an attorney should be able to come in and expand on what they have put in the complaint, in coverage, or even a defense lawsuit. I think that would end up with a very strange method

of analyzing it.

MR. McCORRISTON: (Standing.)

THE COURT: So I am going to quash the subpoena. And while I understand you're wanting to be sure that, Mr. McCorriston, in doing your declaration, that there was nothing improper, and that was the purpose of your doing it, I don't think it adds to the overall basis upon which I should be making a decision, so I don't consider it to be in -- your declaration to be improper in any way, but I don't think it's appropriate evidence for me to consider, and so I am going to strike it.

Now, I will issue a written order with respect to the motion for reconsideration.

MR. McCORRISTON: Your Honor, just for the record, I want to make it clear that the purpose of calling Mr. Jaress

was not to expand on -- or explain new things in the complaint, but also to explain what's in the complaint now.

THE COURT: Okay, I appreciate that, but if you think about it from the point of view of how we treat complaints in the normal course, that's just not how we approach a complaint.

A person attempting to answer the allegations in a complaint -- unless you are in a trial situation, and you do it through evidence, etc., that's one way of expanding on the complaint, or making a motion to modify, at trial, with

respect to a complaint, and have some other cause of action, etc., be considered at trial ,but I don't think that, in this context, it would be appropriate for me to hear from Mr. Jaress.

So we'll deal with the other issues in the written order.

And, I appreciate the fact that we can all have a respectful difference of opinion with respect to this, and that's why they have lawyers for both sides.

So, thank you all.

We stand in recess.

MR. McCORRISTON: Thank you, Your Honor.

MS. BALL: Thank you, Your Honor.

MR. CHING: Thank you, Your Honor.

THE BAILIFF: All rise, please.

Court stands in recess.

(The hearing in the above-entitled cause was concluded at 11:53 a.m.)

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I, Stephen B. Platt, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings before the Honorable Helen Gillmor, United States District Judge.

TUESDAY, MARCH 16, 2005

STEPHEN B. PLATT, CSR NO. 248

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